In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 837

PARNELL BOWLING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 351 F. 2d 236.

JURISDICTION

The judgment of the court of appeals was entered on September 29, 1965. A petition for rehearing was denied on November 3, 1965. The petition for a writ of certiorari was filed on December 20, 1965, and is out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

799-357—66

QUESTION PRESENTED

Whether stolen property seized pursuant to a search warrant was properly admitted into evidence.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Kentucky petitioner was convicted on two counts of wilfully receiving and concealing two calculators belonging to the United States with intent to convert them to his own use in violation of 18 U.S.C. 641. He was sentenced to concurrent terms of imprisonment for one year and one day (A. 12).[1]

The evidence that petitioner had in his possession two business machines which had been stolen from the United States was undisputed. The only factual issues were raised on a motion to suppress the machines as evidence, which was overruled before the trial (A. 12). Testimony at the hearing on the motion revealed that Richard Scully, a Cincinnati police detective, was investigating the theft of an IBM machine from IBM in Cincinnati. On Scully's instructions, the IBM company reported to him when someone called them for the part known to be missing from the stolen machine (A. 18–20, 27–28). Through this method Scully traced the stolen machine to Wesley Hennard in Newport, Kentucky.[2] Hennard at first claimed that he had purchased

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[1] "A." refers to petitioner's appendix in the court of appeals, which is on file with the Clerk of this Court.

[2] Newport, although in Kentucky, is directly across the Ohio River from Cincinnati and is included within Metropolitan Cincinnati.

the machines from a man named "Jake" who drove an old car (A. 19, 27), but thereafter told the officer that he had bought two machines [2] and much more equipment from petitioner (A. 29, 30). Hennard then told Scully that he had seen other business machines on the prescription shelf in the back of petitioner's drug store (A. 30–31).

On April 2, 1963, Scully, on the basis of this information, submitted an affidavit alleging that he was informed by Hennard that five business machines, which he identified by serial number, and other stolen property were in petitioner's possession in his residence (A. 31). Scully also filed affidavits for searches of petitioner's drug store and a building across the street which petitioner owned (A. 26, 27, 72–75). Search warrants were issued that afternoon (Pet. App. E, 17a–19a).

The search was conducted at 6:15 that night by Scully and several local officers. For the next five hours the police recorded serial numbers of some fifty items in the basement of petitioner's home (A. 54a) including the two business machines stolen from the government, other business machines, and hi-fidelity and sporting equipment (A. 34, 63–64). The next day, after determining from the serial numbers that many of the items had been reported stolen, police officers came with a moving van and picked up the stolen goods (A. 46–48).

On April 10, 1963, the warrant was returned to the court with a list of the articles seized. It contained a

[2] Scully had observed a second stolen machine while interviewing Hennard.

notation apparently made at 6:15 p.m. on April 2, 1963, which stated that it had been executed (A. 65–67).

ARGUMENT

The petition for a writ of certiorari is out of time under Rule 22(2) of the Rules of this Court. In any event, there is no reason for further review.

1. Petitioner argues that the affidavit for the search warrant was falsely made by officer Scully (Pet. 7–15). While it is true that the affidavit was inaccurate insofar as it stated that the informant had identified particular machines and had seen them at petitioner's home, the court below properly concluded that the "contention that these errors were of such magnitude and based on such a fraudulent purpose as to vitiate the warrant was never presented to the District Judge * * *" either by motion to suppress or by motion for a new trial (Pet. App. B, 13a). The failure to particularize this objection made it impossible for the trial judge to make essential factual determinations. The hearing on the motion to suppress did not reveal whether the issuing magistrate was orally told that two other search warrants had been or were going to be obtained;[4] whether the searches of the other two premises were completed before or after the warrant issued; and whether the issuing magistrate was made aware of exactly what the informer had told the affiant. Under these circumstances, the failure to object with specificity makes this issue unavailable on

[4] The affidavit for the search of petitioner's residence was presented to a county magistrate rather than to a city police court judge—as were the other two affidavits—because the residence was outside city limits.

appeal. See *On Lee* v. *United States*, 343 U.S. 747, 749–750, n. 3; *United States* v. *Brown*, 348 F. 2d 661 (C.A. 2), certiorari denied, 381 U.S. 904; *Lawson* v. *United States*, 248 F. 2d 654 (C.A.D.C.), certiorari denied, 355 U.S. 963; *United States* v. *Ladson*, 294 F. 2d 535, 538–539 (C.A. 2), certiorari denied, 369 U.S. 824.

Petitioner argues that he raised this issue by claiming that the affidavit was issued as a "fishing expedition" (Pet. 8, 9). But that claim did not challenge specific allegations; it rested on the premise that the officer had no reason to suspect petitioner, and the record made at the hearing adequately refuted that claim. Moreover, petitioner objected when the government attempted to interrogate the affiant on his good faith (A. 32). Government counsel asserted that there were two separate issues—whether the affidavit was valid on its face and whether there was a basis for obtaining a warrant in the first place—and the court then ruled, without further comment from petitioner, that any question as to the officer's intent was irrelevant. If petitioner wished to suggest that the warrant had been obtained by fraud, this was a clear opportunity to explore that issue (A. 32–33).

2. In any event, the officer had adequate probable cause for the issuance of the warrant. Two pieces of stolen property in the informant's possession had been positively identified, and the informant stated that petitioner sold and had many other items at his drugstore. The officer could reasonably conclude that petitioner was a receiver of stolen business property. Since such goods can easily be moved from place to

place, the information constituted probable cause to search petitioner's residence as well as his place of business.

3. It is fundamental that a supporting affidavit must be read together with the search warrant. When this course is followed, petitioner's argument (Pet. 21–25) that the warrant did not state the grounds or probable cause for issuance and that it did not identify the objects to be seized is spurious. This challenge to the warrant is the type of highly technical attack discouraged by this Court in *United States* v. *Ventresca*, 380 U.S. 102.

4. Petitioner's argument that the warrant was not valid at the time of the seizure because of the notation that it had been executed at 6:15 p.m. on April 2, 1963 is without merit (Pet. 25–26). Extensive search and recording *began* on April 2 but the search continued until 11:30 that night and culminated with the seizure of the stolen property on the next day. No legal principle governing search warrants has been cited by petitioner to support the novel proposition that the officer's notation effectively spent the force of the warrant. The warrant was *returned* to the issuing court with a list of the property seized on April 10, 1963, not on April 2, 1963.

5. Petitioner's final contention is that the search was invalid under State law and that this circumstance should render the evidence inadmissible in a federal court (Pet. 26–33). Recognizing that this contention conflicts with *Elkins* v. *United States*, 364 U.S. 206, and *Rios* v. *United States*, 364 U.S. 253, petitioner contends that those decisions should be re-

examined. We submit that there is no basis for such re-evaluation. The rule suggested by petitioner would make the admissibility of evidence in federal criminal cases depend on vagaries of State law—a result inconsistent with Rule 26 of the Federal Rules of Criminal Procedure, which obviously contemplated uniform rules of evidence in all federal criminal proceedings. Compare Rule 43(a), Federal Rules of Civil Procedure, which provides for the admissibility of all evidence which is admissible "in the courts of general jurisdiction of the state in which the United States court is held."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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